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No. 586

In the Supreme Court of the United States

H. W. HANSELL, MARK C. DAMRON and GLADYS I. DAMRON, JOHN E. DYBALL, HENRY M. WARREN, JR., and MARION WARREN, and JANE KEMPTON,

Appellants

vs.

G. A. DOUGLASS, ALEX MARSHALL, REX KASEBERG, WILLIAM D. KETCHUM, KENNETH SNODGRASS, KENNETH WEBB, P. EVERETT CURTISS, and T. F. BRUMBAUGH, acting as the District Boundary Board for Wasco County, Oregon; SCHOOL DISTRICT #9, Wasco County, Oregon (Chenowith), and DON CALDER, OLLIE LASH, ROBERT WOOLSEY, NAT JONES and SAM TRAMONTINA, acting as its directors; SCHOOL DISTRICT #52, Wasco County, Oregon (Mosier), and WM. LEININGER, MARVIN HUDSON, JOHN HUSKEY, CLAUDE BERTHOLD and HOWARD ROOT, acting as its directors; SCHOOL DISTRICT #86, Wasco County, Oregon (Rowena), and WM. GARDNER, LEONARD DALBEC, DALE BROTT, MILLIE BRACE and CHAS. BELLERIVE, acting as its directors,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No.....

H. W. HANSELL, et al, Appellants,

v.

G. A. DOUGLASS, et al, Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Oregon entered effective April 24, 1963 following the denial of the appellants' petition for rehearing entered May 21, 1963 and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is present.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon is reported in 76 Or. Adv. 635, 380 P.2d 977

(1963). The opinion of the Circuit Court of Wasco County, Oregon is not reported. Copies of (A) the judgment and opinion of the Supreme Court of Oregon together with the order denying the petition for rehearing and (B) the memorandum opinion and decree of the Circuit Court of Wasco County, Oregon are attached hereto as Appendix "A" and "B" respectively.

JURISDICTION

This suit is for a declaratory judgment relating to a school consolidation election and is brought on appeal to the Supreme Court of the United States under the Fourteenth Amendment, U. S. Constitution, to set aside the judgment and decision of the Supreme Court of Oregon. The judgment of the Supreme Court of Oregon, effective April 24, 1963, was entered following that court's denial of appellants' petition for rehearing entered May 21, 1963 and the notice of appeal to the Supreme Court of the United States was filed in the Oregon Supreme Court on July 22, 1963, and an order granting an extension of time to and including October 31, 1963 in which to serve and file the record with the clerk of the Supreme Court of the United States was signed by the Oregon Supreme Court Chief Justice, September 12, 1963.

The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. sec. 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case.

Baker vs. Carr, 369 U.S. 186, 82 S. Ct. 691 (1962).

Gomillion vs. Lightfoot, 364 U.S. 342, 81 S. Ct. 125 (1960).

QUESTION PRESENTED

The single question presented is whether the denial of the initiative power to the voters in one school district and the granting of use of such power in another school district of a larger size constitutes discrimination as to the voters of smaller districts and is therefore repugnant to the privileges and immunities, equal protection and due process of sec. 1 of the Fourteenth Amendment, United States Constitution or to any one or more of said constitutional provisions.

STATUTES INVOLVED

Oregon Law:

Articles I, sec. 20 and IV, sec. 1 (a) Oregon Constitution, Oregon Revised Statutes Chapter 254, Oregon Revised Statutes 330.110 and 331.130. These statutes and constitutional provisions are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

A. THE INSTANT CASE

In June, 1962 interested voters and taxpayers instituted a declaratory suit in Wasco County, Oregon, to render null and void a school consolidation election proceeding of May 7, 1962 in which the Chenowith School District No. 9, Mosier School District No. 52 and Rowena School District No. 86 were consolidated into what is now known as Consolidated School District No. 9.

The claim of the appellants was that the consolidation election procedure was replete with errors and omissions in flagrant violation of the requirements of the initiative laws of the State of Oregon. The trial court, the Wasco County Circuit Court, Wasco County, Oregon and the Supreme Court of Oregon on appeal concluded that the consolida-

tion election was valid and in this instance was not within the purview of the Oregon initiative election laws.

The facts in the case, substantiated by the clear transcript of testimony taken at the time of trial show that there were violations of the Oregon initiative election statutes including a failure of the petition carriers to verify the petitions circulated prompting the election, an absence of a certificate concerning the authenticity of the signatures upon the petitions, a total neglect by the county clerk to certify the signatures on the petitions to be those of registered voters in the respective districts. To illustrate this particular neglect, the following is taken from the transcript of testimony wherein the county clerk testified as to the approach she took concerning certification of the signatures on the petitions:

> "* * * We had a great number of school elections and a whole lot of petitions coming into the office this spring. Some of them I looked up all of them. Some of them I looked up some of them. Some of them I didn't look up any." (Transcript of testimony p. 186) (See appellants' abstract of record and brief p. 34).

The notices for the election were published by unauthorized agencies, there was improper counting and reporting of the ballots cast and tallied, unsealed ballot boxes, and general loose handling of the election from the outset.

The complaint of the appellants and the proof presented on their behalf was, at the time of trial and at the time of presentation before the Oregon Supreme Court, premised upon the necessity in this election proceedings of following the express mandate and conditions of the initiative statutes of Oregon. (See Appendix "C"). Article IV, sec. 1a of the Oregon Constitution and the statutes promulgated thereunder, Chapter 254, Oregon Revised Statutes, expressly provide that all "districts" in the state holding an election shall be required to follow the mandate of the

initiative laws. Nevertheless, the trial court and the Supreme Court of Oregon concluded that in this small special school district consolidation election the initiative laws of the state of Oregon did not apply and therefore were not required to be met.

As the appellants will explain in the section of this jurisdictional statement designated "The Question is Substantial", by express statute school districts within the state of Oregon having a population in excess of 100,000 shall comply with the initiative election laws in the event of an election in such districts. Yet by the decision of the Oregon Court in the instant case, the school districts involved herein are not permitted the protection and insulation of these initiative statutes.

The principal issue therefore presented by this appeal is whether or not the Oregon Supreme Court can properly deprive the voters of the small districts herein involved of the protections and requirements of the Oregon initiative statutes yet permit the statutory application of the initiative statutes to protect the voters in school districts having an excess of 100,000 persons.

B. HOW THE FEDERAL QUESTION IS PRESENTED

The constitutional question was first raised by the amended complaint of the appellants herein. The opinions of the trial court (Wasco County Circuit Court, Wasco County, Oregon) and the Supreme Court of the State of Oregon, make no reference to the federal issue. Appellants petitioned for a rehearing of the case on May 14, 1963 urging the federal constitutional question. The Oregon Supreme Court summarily denied the petition for rehearing without opinion. That portion of the appellants' petition for rehearing before the Oregon Supreme Court relating to the federal question is quoted in part as follows:

"Where voters were denied the use of initiative power in one school district and residents of another school district are imbued with the power, such inconsistency constitutes denial of equal protection of laws as to the former."

Citing: U. S. Const., Amend. XIV, sec. 1.

(See appellants' petition for rehearing at pp. 5-6, contained in the transcript of proceedings on file herein.)

THE QUESTION IS SUBSTANTIAL

The importance of this appeal is premised on the ground that there has been a deprivation under color of state judicial decision of the right, privilege and immunity conferred upon the voters in the state of Oregon under the Oregon initiative statutes which are secured by the Constitution of the United States providing for equal rights of citizens and of all persons within the jurisdiction of the United States. This case involves a great deal more than a mere local school consolidation; the conclusion recited in the appellants' brief to the Oregon Supreme Court is of significance:

"The broad question of the validity of this special consolidation election strikes at the heart of the people's most cherished right: the voting franchise. The standards in the laws of election procedure were promulgated to safeguard and protect this franchise from the whim and pressure of the enthusiastic fervor of local folk. It is, therefore, incumbent upon the duly elected and appointed election functionaries to closely adhere to the mandate of the election laws.

Although sincere voters should be privileged to express their view, it would be a greater evil for the courts to ignore the law itself by permitting election officials to supplant statutory requirements designed to safeguard the integrity of elections with local ideas and idiosyncrasies.

> It is submitted that based upon the record and authorities reviewed in this brief the special consolidation election of May 7, 1962, should be declared invalid."
> (Appellants' abstract of record and brief pp. 108-109)

The remarks introducing this section of the jurisdictional statement are paraphrased from the federal Civil Rights Act concerned with the elective franchise (28 U.S.C. sec. 1343 (3), 28 U.S.C.A. sec. 1343 (3).) This federal statute although specifically applicable in determining U. S. District Court jurisdiction, in the instant case points up the concern of protecting the equal rights of citizens under local voting laws within the United States.

In the instant case, the Oregon Supreme Court has ruled that in this consolidation election involving a mere 850 or so voters the protections of the state initiative election statutes do not apply. These initiative statutes are enacted to protect against malfeasance and misfeasance on the part of the local election authorities. In the wise judgment of the Oregon legislature such built-in protections to the voters were felt to be necessary for all "districts." Nevertheless, the Oregon Supreme Court ruled that these statutes do not apply to a local school consolidation election.

Within the same school laws under the statutes of Oregon, the Oregon state legislature provided for the application of the initiative statute for school districts having 100,000 persons or more (Oregon Revised Statutes, 331.-130). The result of the Oregon Supreme Court decision in the instant case is that the protections of the initiative statute of Oregon apply on the one hand to a very large school district having in excess of 100,000 persons but do not apply in school districts of a lesser population. It is this conflict created by the Supreme Court of Oregon which constitutes a discrimination against the voters in the smaller school districts.

The area in which the appellants are concerned was considered and acted upon by the Supreme Court of the United States in the cases of *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962) and *Gomillion v. Lightfoot*, 364 U.S. 342, 81 S. Ct. 125 (1960). These two cases and the authorities cited therein show that the development of the law concerning local and state elections has come to such a point that in the event there is found to be discrimination resulting from state legislation or from the decisions of the highest court of the state, the matter becomes one of concern to the Supreme Court of the United States.

The court in the *Gomillion* case in effect states that when the state exercises power wholly within domain of state interest, it is insulated from federal judicial review but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. The *Gomillion* case was of course a matter involving a state not a federal election; nevertheless, the Supreme Court of the United States conferred jurisdiction to review the claim. The *Baker* case concludes that a claim of certain state voters that they were being denied equal protection was justiciable and subject to review by the Supreme Court of the United States, and if discrimination was sufficiently shown, right to relief under the equal protection clause was not diminished by the fact that the discrimination related to political rights.

The fact that a local election is involved has not in the past prompted the Supreme Court of the United States to deny jurisdiction as evidenced by the case of *Gobitis v. Minersville School District*, 21 F. Supp. 581 (D.C. Pa. 1937) and cases cited thereunder.

It is imperative that the United States Supreme Court resolve the question of the application of the initiative statutes of Oregon and conclude that not only school districts having a population of more than 100,000 voters but school districts having a lesser number of voters come within the initiative law. In the event the decision of the Oregon Supreme Court herein is permitted to stand, the protections and insulations provided by the initiative statutes of the state of Oregon will apply to the elections that take place in only one school district in the entire state*, and all other school district elections in the state of Oregon will be subject to a complete lack of control and regulation.

CONCLUSION

For the foregoing reasons, this direct appeal from the Supreme Court of the state of Oregon should be granted.

Respectfully submitted.

ERVIN W. POTTER

Of Attorneys of Record for Appellants

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* The school district within Multnomah County, Oregon is the only school district in Oregon having a population in excess of 100,000 persons.

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APPENDIX A

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday of the 4th day of March 1963, WHEREUPON on this Wednesday, the 24th day of April 1963, the same being the 24th judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice
George Rossman, Associate Justice
William C. Perry, Associate Justice
Gordon W. Sloan, Associate Justice
Kenneth J. O'Connell, Associate Justice
Alfred T. Goodwin, Associate Justice
Arno H. Denecke, Associate Justice, and
F. M. Sercombe, Clerk,

when the following proceedings were had:

H. W. HANSELL, MARK C. DAMRON and GLADYS I. DAMRON, JOHN E. DYBALL, HENRY M. WARREN, JR., and MARION WARREN, and JANE KEMPTON,

Appellants

and

HARVEY ALUMINUM (INCORPORATED),

Intervenor-Appellants

vs.

G. A. DOUGLASS, ALEX MARSHALL, REX KASEBERG, WILLIAM D. KETCHUM, KENNETH SNODGRASS, KENNETH WEBB, P. EVERETT CURTISS, and T. F. BRUMBAUGH, acting as the District Boundary Board for Wasco County, Oregon; SCHOOL DISTRICT #9, Wasco County, Oregon (Chenowith), and DON CALDER, OLLIE LASH, ROBERT WOOLSEY, NAT JONES and SAM TRAMONTINA, acting as its directors; SCHOOL DISTRICT #52, Wasco County, Oregon (Mosier), and WM. LEININGER, MARVIN HUDSON, JOHN HUSKEY, CLAUDE BERTHOLD and HOWARD ROOT, acting as its directors; SCHOOL DISTRICT #86, Wasco County, Oregon (Rowena), and WM. GARDNER, LEONARD DALBEC, DALE BROTT, MILLIE BRACE and CHAS. BELLERIVE, acting as its directors,

Respondents.

Appeal from WASCO County

This cause on April 2, 1963, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of the court below rendered and entered in this cause be and the same is in all things affirmed.

Appellants having given an undertaking on appeal with St. Paul Fire and Marine Insurance Company as surety conditioned that appellants will pay all damages, costs and disbursements which may be awarded against them on the appeal,

IT THEREFORE IS ORDERED that respondents have and recover of and from appellants and their surety their costs and disbursements in this court taxed at $156.00.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a judgment and decree in accordance herewith.

H. W. HANSELL, MARK C. DAMRON AND GLADYS I. DAMRON, JOHN E. DYBALL, HENRY M. WARREN, JR., AND MARION WARREN AND JANE KEMPTON, APPELLANTS,

AND

HARVEY ALUMINUM (INCORPORATED), INTERVENOR-APPELLANT,

v.

G. A. DOUGLASS ET AL., RESPONDENTS

Supreme Court of Oregon,

In Banc.

Argued and Submitted April 2, 1963.

Decided April 24, 1963.

David A. Rhoten and Sam F. Speerstra, Salem, argued the cause for appellants and intervenor-appellant. With them on the briefs were Rhoten, Rhoten & Speerstra, Salem.

M. D. Van Valkenburgh, The Dalles, and Howard A. Rankin, Portland, argued the cause for respondents. With them on the brief were Heisler & Van Valkenburgh, The Dalles, and Shuler, Sayre, Winfree & Rankin, Portland.

Before McALLISTER, *C. J.*, and ROSSMAN, PERRY, SLOAN, O'CONNELL, GOODWIN and DENECKE, *J. J.*

Affirmed.

SLOAN, *Justice.*

This was a declaratory judgment proceeding by which plaintiffs, and the intervenor, challenged a school election. The challenged election favored the consolidation of three school districts in Wasco county. The trial court found that the election was valid. Plaintiffs and intervenor appeal.

The major premise of plaintiffs' challenge is found in this statement taken from their brief:

> * * * "There can be no doubt that a school election is an exercise of the initiative process and subject to the statutes enacted pursuant to Art. IV, Sec. 1a of the Oregon Constitution."

Plaintiffs cite no authority to support this statement.

Article IV, § 1a of the Constitution provides that the initiative and referendum power are reserved to the "legal voters of every municipality and district, as to all local, special and municipal legislation * * *." Chapter 254 of ORS contains the statutes referred to by plaintiffs, above, governing the procedure required to begin and hold an initiative election. Plaintiffs' claim that the failure to follow that procedure by the respective school officials who conducted the challenged election caused the election to be

void. The election procedure that was followed in this election was that set forth in ORS 330.110 et seq. The latter statutes are enactments that apply to all school districts and relate specifically to elections for the consolidation of school districts.

Plaintiffs' premise as to the law governing the election was wrong. Prior decisions of this court, contrary to plaintiffs' theory, make it abundantly clear that a school district was not a "municipality or district" that was granted the initiative power by Article IV, § 1a. School District No. 35 v. Holden, 1915, 78 Or. 267, 151 P. 702; School District No. 17 v. Powell, 1955, 203 Or. 168, 279 P.2d 492. And particular reference is made to the searching opinion of Justice Harris in Rose v. Port of Portland, 1917, 82 Or. 541, 162 P. 498.

Prior to the decision in the Rose case this court had given conflicting decisions construing the meaning of Article IV, § 1a and its companion amendment of 1906, Article XI, §2. The latter was the Home Rule Amendment. See Burton v. Gibbons, 1934, 148 Or. 370, 36 P.2d 786.

The opinion in the Rose case decided that the two amendments must be construed together and then exhaustively analyzed the two amendments with unusual clarity and reason. The conclusion was reached that the two amendments extended the initiative power only to those municipalities and districts that had the power to legislate; basically cities and towns. The opinion said * * * "no other corporate body can, without an enabling act, legislate power unto itself to legislate." 82 Or. at 573, 162 P. at 508. The case held that the Port of Portland did not have the initiative power. A year later, in Carriker v. Lake County, 1918, 89 Or. 240, 171 P. 407, 173 P. 573, Justice Harris, in even more emphatic language, applied the same rule to a county:

> * * * "In obedience to a rule of construction recognized and applied everywhere, this court has at all times and without a single dissenting voice read and construed these two sections of the Constitution together: (State [ex rel.] v. Port of Astoria, 79 Or. 1, 10, 154 Pac. 399), and when they are construed together the inevitable conclusion is that every municipality must have a charter, and, since cities and towns are the only municipalities which are granted the power to make their own charters, it follows that a county cannot make its own charter. A county cannot enact a law unless the power to enact that law is referable to a grant of power made by the people of the whole state or by their representatives, the Legislature. * * * As pointed out in Rose v. Port of Portland, 82 Or. 541, 553-558, 570, 162 Pac. 498, the words found in the two sections of the Constitution, when read together, define the extent of the power of the referendum and define and limit the power of the initiative." 89 Or. 245, 246, 173 P. 574, opinion on petition for rehearing.

The same rule would apply equally, if not more so, to a school district. "Although the municipality in Rose v. Port of Portland was a port, and the municipality in the instant case is a county, nevertheless the legal principle involved is identical in both cases." Carriker v. Lake County, supra, 89 Or. 244, 171 P. 408.

The Rose case is also important here for its determination that the two amendments did not limit the power of the legislature to enact general legislation governing all municipalities and districts.

The plaintiffs' contentions, therefore, that the election was invalid because the procedures for an initiative election were not followed are without merit.

Plaintiffs also complain of other alleged deficiencies in the election procedure. These allegations relate to the manner in which notice of the election was given; the failure to

make proper entries in the minutes of the meetings of the school districts involved in the consolidation; the failure to properly seal the ballot boxes after the election and similar charges of "gross negligence and disregard of official duties * * *."

In respect to all of these contentions we fully agree with the thoughtful and considered opinion of the trial judge who found that:

> "With reference to the other claimed errors in failure to follow the statutory procedure, it is my opinion that the plaintiffs have the burden of proving that such irregularities would actually have changed the result of the election. School District No. 17 vs. Powell, supra, [207 Or. 168 [279 P.2d 492] before cited], follows the rule of the Witham case [Witham v. McNutt, 1949, 186 Or. 668, 208 P.2d 459] to the effect that the election would not be invalidated by a court for ministerial, procedural or other imperfections which do not leave a probability that the result of the election would have been changed. In this case there is no allegation or claim of fraud in the mehtod in which the ballots were cast, in counting of the ballots or the manner in which the ballots and the ballot boxes were handled after the election, nor do we have any tampering with the ballots or allegations pertaining thereto.
>
> "I have reviewed the entire record and the allegations of plaintiffs with reference to these alleged defects in carrying out the statutory provisions, and it is my opinion that while there are ministerial defects so far as the statutory procedure is concerned, the outcome of the election was not affected thereby and it is therefore improper for this Court to declare the election void for these reasons."

The court also found that there had been substantial compliance with the statutory requirements in accordance with the decisions in the Powell and Witham cases above cited. In this respect it is well to also cite the valuable

volume of Edwards, The Court and The Public Schools, (rev. ed. 1955), page 58, et seq. to show that this court follows the "prounounced [sic] weight of authority" in subscribing to the substantial compliance rule.

There is a further assignment that the trial court erred when, long after the case had been submitted, the court refused to allow an amendment to the complaint. The proposed amendment contained what were alleged to be newly discovered facts. ORS 16.390 permits the court to permit amendment "* * * at any time before the cause is submitted, * * *." The trial court found that the cause had been submitted and that the amendment injected a new issue. The trial court did not abuse its discretion when it denied leave to amend. Tracy and Baker v. City of Astoria, 1951, 193 Or. 118, 129, 237 P.2d 954, 959. And see State ex rel. Konen Construction Co. v. United States Fidelity & Guaranty Company, 76 Adv.Sh. 579, Or. 380 P.2d 795.

Affirmed.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday of the 4th day of March 1963, WHEREUPON on this Tuesday, the 21st day of May 1963, the same being the 32nd judicial day of said term, there were present:

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H. W. HANSELL, et al,
Appellants

and

HARVEY ALUMINUM (Incorporated),
Intervenor-Appellant

v.

G. A. DOUGLASS, et al,
Respondents

} Appeal from WASCO County

The court having duly considered appellants' and intervenor-appellant's petition for rehearing, and being fully advised therein

IT HEREBY IS ORDERED that said petition be and the same hereby is denied.

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR WASCO COUNTY

No. 10302

H. W. HANSELL, et al., Plaintiffs,

and

HARVEY ALUMINUM (Incorporated), Intervenor,

vs.

G. A. DOUGLASS, et al., Defendants.

Memorandum Opinion

This matter comes before the Court for declaratory judgment to determine the legal rights and relations of the parties as they pertain to a school district consolidation proceeding and to determine the validity of the election procedures followed in the consolidation of the three districts involved. Plaintiffs and Intervenor are hereafter referred to simply as plaintiffs.

There does not appear to be any great dispute over the facts as disclosed by the evidence. Petitions were circulated in the three school districts involved, to-wit: 9, 52 and 86, for the proposed consolidation. In School Districts 52 and 86 notarized certificates were executed by the petition carriers which stated that each person who signed the petition did so in the carrier's presence and that each signer stated his correct address and that he was a legal voter. However, in School District 9 the certificate was not executed by the petition carrier and it developed on cross-examination that several signatures were obtained out of the carrier's presence in instances where wives signed for husbands, or in situations where the carrier waited outside of a home while the petition was being signed inside. These petitions from the

three districts were filed on April 4, 1962, in the office of the Clerk of the County Committee for Reorganization of School Districts. Mr. Brumbaugh, County School Superintendent, served as clerk of both the Reorganization Committee and also the Rural School Board and the District Boundary Board Committee.

On April 9, 1962, the Rural School Board passed a motion to the effect that "the election on the question of consolidation of School Districts No. 9 (Chenowith), No. 52 (Mosier), and No. 86 (Rowena), all of Wasco County, Oregon, be held on May 7, 1962" in accordance with O.R.S. 331.010. On April 10, 1962, the County Committee for Reorganization met and passed a motion to the effect that "the privilege of holding consolidation elections in the respective districts in accordance with Sections 330.110 - 330.120 and 330.132 of the Oregon State law" be granted. However, this motion was stricken out of the minutes (Plaintiffs' Exhibit "4"), and on April 17, 1962, the Reorganization Committee met again and Plaintiffs' Exhibit "5" reveals that a question had arisen as to the right of an alternate to second the motion made at the April 10th meeting. A motion was then made and carried that the portion of the minutes of the April 10th meeting relating to permission for the consolidation election be stricken from the record and thereupon a new motion was made and carried to the effect "that the Reorganization Committee of Wasco County grant School Districts 9, 52 and 86, all of Wasco County, the privilege of holding consolidation elections in the respective districts in accordance with Sections 330.110 - 330.120 and 330.130 of Oregon State law." The evidence further discloses that on April 16, 1962, Mr. Brumbaugh as Clerk of the Boundary Board had prepared a Notice of Election bearing date of April 14, 1962 (Plaintiffs' Exhibit "6"), which was signed by Guy Douglass as

Chairman of the Wasco County Rural School Board, and attested to by Mr. Brumbaugh, Clerk of the Rural School Board. Mr. Brumbaugh personally delivered these notices to the respective clerks of the three districts for posting. The evidence discloses that these notices were posted on April 16, 1962, by the respective district clerks (Defendants' Exhibits C-1, C-2, D-1, D-2, D-3), and also was published in The Dalles Chronicle in the issues of April 17th and 25th, 1962, (Plaintiffs' Exhibit 7-A, 7-B, 7-C). The testimony further revealed that no written directive was given by the Boundary Board to the respective district clerks with respect to posting of the notices and the respective district boards were not convened to order the notices posted or to execute the same by the chairman and the clerks of the respective districts. The time and place of posting was recorded in the minute books of Districts 52 and 86, but was not recorded in the minute book of District 9.

In Districts 86 and 52 tellers were not appointed to receive and count the ballots, but the testimony reveals that the judge and clerks of the election made the actual count. The respective district clerks of the three districts did not keep a tally sheet as counted by the tellers but the results of the election were certified to by the judge and the clerks of election (Plaintiffs' Exhibits 10-A, B, C). In District 9 the clerk of the district also signed the certificate. The tally sheets were not certified to as correct by the clerk of the school board nor signed by the chairman of the school board. The tally sheet, poll list and ballots were delivered to the clerk of the Boundary Board in sealed containers except for District No. 9 which was in a padlocked box containing sealed envelopes.

No statement was attached to the respective ballot boxes setting forth the number of the district, the county or the date of election and the ballot boxes did not have a state-

ment of the results of the election attached thereto. After the polls closed in each district the respective election boards did not certify and report the results and did not canvass the votes and report the results to the County Superintendent. The certificate and report of the election board from each district (Plaintiffs' Exhibits 10-A, B, C), used the word "administrative" school district.

With this statement of facts it is the contention of plaintiffs that several irregularities occurred contrary to the law which would void the election of May 7, 1962. On the other hand, defendants basically contend that even if irregularities did occur contrary to the school laws controlling consolidation of districts, the outcome of the election would not be changed and therefore the election should not be declared invalid. For this contention defendants have cited the Supreme Court decisions which in later years have gradually veered away from the old rule requiring absolute, strict compliance and have taken the more liberal interpretation on which they rely.

The first objection raised in the plaintiffs' complaint poses the question of whether the petition circulated in District No. 9 had to be certified by the petition carrier. It is the contention of plaintiffs that the Boundary Board was without jurisdiction to order the election as they contend the power granted to school districts to hold special elections is derived from the initiative process and general statutes thereto which must be followed. They rely for their constitutional authority on Article IV, Section 1-a, which authorizes the initiative and referendum process and the statutes pursuant thereto, O.R.S. 254.340, 254.040 (1), (2), 330.060 and 330.110. It is their contention that school districts are a political subdivision of the State and as such municipality or district, is subject to the initiative and referendum law which in turn requires verification

of signatures on the initiating petition (O.R.S. 254.040). Several cases are cited by plaintiffs and have all been considered by the Court, but it is noted that the initiative sections for statutory procedure pertaining thereto are created under Article IV, Section 1-a of the Oregon Constitution as adopted by vote of the people on June 4, 1906. However, the constitutional authority for school laws, including consolidation statutes, stem from Article VIII, Section 3 of the Oregon Constitution as originally adopted in 1857. The consolidation statute which controlled this election was passed by the legislature in 1903 pursuant to the constitutional authority for the establishment of the common school system and it is readily seen that the initiative provisions were not even in existence until 1906. It is also noted that no reference is made under either the initiative statutes or the school election statutes for the initiative procedure to be used in a school election. The only reference in the school law to verification of a petition is set out in O.R.S. 331.430. This section of the code is on the subject of recall petitions and is not applicable to the situation in the case at bar. With this in mind it is my opinion that the failure to verify the petitions of School District No. 9 is not a jurisdictional defense.

Plaintiffs have argued that the County Clerk failed to determine the genuineness of several of the signatures appearing on the petitions, particularly of School District No. 9, and the record discloses that there were several instances of signatures which the County Clerk believed to be genuine but on questioning it developed that the County Clerk never checked the signatures against the registration cards and did not issue a certificate. However, the record also discloses that Mr. Brumbaugh's secretary, Mrs. Dickinson, made a further check of the signatures with the registration lists and although the record reveals that both the County

Clerk and Mrs. Dickinson checked off names which appeared on the petitions from District No. 9 whose signatures were admittedly signed by a spouse, the record further discloses that there were in excess of 200 bona fide signatures. At least no proof was offered to the contrary that over 200 signatures were not valid, and O.R.S. 330.110 requires that the petition filed be signed by at least 100 legal voters in a district such as 9. In other words, despite the evidence of invalid signatures, the proof did not go far enough to invalidate the petition, and it is therefore my opinion that the petition received and acted upon by the Board was signed by more than the required 100 legal school voters in District 9.

Further, with reference to the contention that the County Clerk is required to certify as to the genuineness of signatures, it is noted that the law does not require the County Clerk to make such an examination and certificate.

Plaintiffs make the further contention that the District Boundary Board is required to look into the validity of the petitions before acting, (citing O.R.S. 330.110) and the further proposition that the District Boundary Board failed to make findings as to the sufficiency of the petitions prior to fixing the election date. The record discloses that Mrs. Dickinson did check the signatures appearing on the petition against the voters' registration cards in the County Clerk's office, and while this procedure may not have satisfied plaintiffs, they did not refute the presumption of validity by proof that 100 legal school voters had not signed the petition. It is therefore my opinion that this contention has no merit.

The plaintiffs' next contention is set forth in Paragraph V, sub-paragraph "C" of their Amended Complaint, which would require the County Committee for Reorganization to make findings that such consolidation is desirable and is not

likely to conflict with any contemplated reorganization under the provisions of O.R.S. 330.505, et seq., and particularly O.R.S. 330.645. They cite as authority the case of *Roseburg Lumber Company vs. State Tax Commission*, 223 Ore. 295. The record discloses, however, that on January 31, 1961, (Plaintiffs' Exhibit "19"), a motion was made by the Reorganization Committee that the Committee give Districts 9, 52 and 86 the privilege to work on a plan for the three districts. This was followed by a letter (Defendants' Exhibit "A"), under date of February 1, 1961, to Mr. Don Calder, Chairman of School District 9 which states in part:

> "The committee wishes to point out that the above resolution does not prohibit the above districts starting consolidation procedures under the regular consolidation law if the boards or patrons of the above districts so desire."

It should be remembered that this resolution and letter were written after the Reorganization Committee's original plan to form an Administrative District had been disapproved by the State Board of Education. It is my opinion that although the resolution and letter are not in the exact words of the statutory requirement for findings on desirability for the boundary change and that such change is non-conflicting with any future reorganization plan, it certainly is a finding to the effect that the Reorganization Committee was willing to permit the consolidation of the three districts and in its broad interpretation satisfies the statutory requirement.

It is my opinion that the *Roseburg Lumber Company* case, *supra*, is distinguishable from the case at bar in that the State Tax Commission is a quasi-judicial body with regulation making power whereas the Reorganization Committee does not have any quasi-judicial function but merely makes recommendations pertaining to schools within the

county to obtain greater equalization of educational opportunities and more economical administration of the schools and equitable distribution of school revenues. The Reorganization Committee also has the power of recommending boundary changes but cannot on its own authority make any regulations which would be binding on the respective districts involved. In the Roseburg Lumber Company case there were no findings but simply the order, and the question involved was to determine whether or not it was an arbitrary order, whereas in the case at bar we do have these two exhibits above mentioned. It is therefore my opinion that this contention is not well taken.

The next contention raised by the plaintiffs relates to sufficiency of the Notice of Election. Plaintiffs contend that the requirements of O.R.S. 331.005 and 331.010, with reference to requirements for notice of election for consolidation, were not complied with and contend that these sections of the code are mandatory with respect to posting and publication of the notices. It is also their contention that while the Courts' interpretation prior to 1957 of the law pertaining to notice of election was that there was considerable laxity in giving notices of a special election, that the amendments of 1957 made it mandatory that there be strict compliance with the statute. It is noted that the case of *School District No. 17 vs. Powell, 203 Ore. 168*, cites *Witham vs. McNuit, 186 Ore. 668*, with approval, and in both cases invoked the presumption that the official duty had been regularly performed. In the *Witham* case one notice was actually posted outside of the district but the preponderance of evidence established that the result would not have been changed had the notice been properly posted, and the Court held that this was not a fatal defect of the election. In the case at bar notices were published in The Dalles Chronicle, the only local, daily newspaper, the re-

quired length of time. Notices were also posted in each district and while it is contended by the plaintiffs that no notice was given either written or oral by the Boundary Board to the various district school boards until April 16, 1962, which would be 12 days after the petitions were filed with the Boundary Board, it is my opinion that this is not a fatal defect as contended by the plaintiffs. It was not alleged in the complaint that the election result would have been changed had the notice been given in absolute conformity with the statutory requirements, and in fact, no evidence was offered to support such a contention. It is my opinion that there was substantial compliance with the statutory provisions for giving of notice and that this particular election was fully publicized so that the electors had actual notice of the time and place of the holding of the election. It is my opinion that this election comes within the liberal interpretation by our Supreme Court that where the people have actually expressed themselves at the polls the Courts are strongly inclined to uphold rather than to defeat the public will. In this case the outcome of the election is not even challenged had the notices been given in strict compliance with the statute.

In this connection it should be noted that plaintiffs have undoubtedly inadvertantly misread O.R.S. 330.110, subsection (2), in that they have stated that this section of the code provides that:

> ". . . the District Boundary Board must notify the District School Board . . . *to* fix the date of and be responsible for supervising . . . ."

This is not the law as a reading of the statute plainly states that:

> ". . . the District Boundary Board shall notify the District School Board of each district designated by the peti-

tion, fix the date of and be responsible for supervising the giving of notices . . . ."

Accordingly, the district school boards do not have any statutory requirement to fix the date of and be responsible for supervising of giving of notices, and the contention of the defendants is therefore correct in that the District Boundary Board had the responsibility and took the same in connection with giving of notices in the case at bar.

Plaintiffs further contend that the election should be invalidated as they contend the whole conduct of the election officers shows such gross negligence and disregard of their official duties as to leave a judicial mind in doubt as to how the election resulted or would have resulted but for such widespread irregularities. The argument for this contention is based upon the factual situation as revealed by the evidence with reference to the unverified petitions, wives signing husbands' names, counting of the ballots and generally the claimed departures from statutory procedure as set forth in the Complaint under Paragraph V, sub-paragraphs (e) through (m). The manner of handling the petitions with reference to verification and signatures thereon has been heretofore covered in this opinion. With reference to the other claimed errors in failure to follow the statutory procedure, it is my opinion that the plaintiffs have the burden of proving that such irregularities would actually have changed the result of the election. *School District No. 17 vs. Powell, supra*, follows the rule of the *Witham* case to the effect that the election would not be invalidated by a court for ministerial, procedural or other imperfections which do not leave a probability that the result of the election would have been changed. In this case there is no allegation or claim of fraud in the method in which the ballots were cast, in counting of the ballots or the manner in which the ballots and the ballot boxes were handled after

the election, nor do we have any tampering with the ballots or allegations pertaining thereto.

I have reviewed the entire record and the allegations of plaintiffs with reference to these alleged defects in carrying out the statutory provisions, and it is my opinion that while there are ministerial defects so far as the statutory procedure is concerned, the outcome of the election was not affected thereby and it is therefore improper for this Court to declare the election void for these reasons.

In this case the plaintiffs have failed to overcome the presumption of validity of the election by proving that any of the irregularities claimed would have changed the result of the election. In fact, there was no allegation to that effect and no proof was offered that the outcome of the election would have been changed. In conclusion, it is therefore my opinion that the consolidation election held on May 7, 1962, was a valid election.

This Memorandum Opinion is being filed in this case and counsel for defendants may prepare and submit a Decree in conformity herewith.

DATED this 18th day of September, 1962.

/s/ M. W. WILKINSON
Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

No. 10302

H. W. HANSELL, et al — Plaintiff
vs.
G. A. DOUGLASS, et al — Defendant

DECREE

This matter having come on for trial, the plaintiffs appearing by their attorneys, Rhoten, Rhoten & Speerstra

by Sam F. Speerstra and David A. Rhoten and the defendants appearing in person and by their attorneys, M. D. Van Valkenburgh and Howard Rankin; the Court having heard the testimony and evidence having been presented and arguments by counsel, the Court having heretofore rendered its memorandum opinion on the 18th day of September, 1962.

FINDINGS

The Court finds that the plaintiffs have failed to overcome a presumption of the validity of the election by proving that any of the irregularities claimed would have changed the result of the election.

The Court further finds that said election is a valid and constitutional election.

NOW THEREFORE, the Court being fully advised:

IT IS HEREBY ORDERED AND DECREED that the Wasco County School Districts Numbered 52, 86 and 9 Consolidation Election of May 7, 1962, was and is a valid election.

Dated this 9th day of October, 1962.

/s/ M. W. WILKINSON
Judge

APPENDIX C

FEDERAL AND STATE STATUTES AND CONSTITUTIONAL PROVISIONS

Federal Law:

28 U.S.C. sec. 1343 (3) as related in 28 U.S.C.A. sec. 1343 (3)—

"SECTION 1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *"

State Law:

Article I, sec. 20. Constitution of Oregon—

"SECTION 20. Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens. —"

Article IV, sec. 1a. Constitution of Oregon—

"SECTION 1a. Initiative and referendum on parts of laws and on local, special and municipal laws. The referendum may be demanded by the people against one or more items, sections or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections

or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution, are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than 10 per cent of the legal voters may be required to order the referendum, nor more than 15 per cent to propose any measure, by the initiative, in any city or town."

Chapter 254, *Initiative, Referendum* and *Recall*, Oregon Revised Statutes provides in part:

ORS 254.340. Procedure for municipalities and districts in use of the initiative and referendum, provides in part:

"(1) Any municipality or district in exercising the powers of the initiative and referendum granted by sections 1 and 1a, Article IV, Oregon Constitution, shall follow the procedure in ORS * * * 254.030 to 254.100 * * *".

'(2) When a county or any municipality or district situated solely within one county is exercising these powers, th ecounty clerk shall be substituted for the Secretary of State, the district attorney for the Attorney General and the county judge * * * for the Governor; * * *

'(3) For the purposes of this section the term 'municipality or district' includes ports and all other political subdivisions of the state.' "

* * * * *

"254.040 VERIFICATION OF SIGNATURES. (1) Every sheet of each initiative or referendum petition containing signatures shall be verified on the face thereof by

the affidavit of the person who circulated the sheet, stating that every person who signed the sheet did so in his presence and that he believes that each signer stated his correct residence address and is a registered elector.

(2) The county clerk of each county in which a petition is signed shall compare the signatures of registered electors signing it with the signatures of registered electors on the register of electors and shall make and attach to the petition his certificate stating the number of signatures he believes to be genuine. The certificate is prima facie evidence of the facts stated therein and of the qualifications of the registered electors whose signatures are included in the number certified to be genuine.

(3) The Secretary of State shall count only the signatures on the petitions that are included in the number certified by the county clerk to be genuine and those remaining signatures that are proved to be the genuine signatures of registered electors by the official certificate of a notary public of the county in which the signer resides.

(4) The county clerk shall not retain in his possession any petition or any part of one for longer than two days for the first 200 signatures on it and one additional day for each 200 additional signatures, or fraction thereof, on the sheets presented to him. At the expiration of that time he shall deliver it to the person from whom he received it, with his certificate attached."

Chapter 330, School District Organization and Consolidations. Oregon Revised Statutes provides in part:

"CONSOLIDATION

330.110 PETITION FOR CONSOLIDATION; NOTICE OF MEETINGS TO VOTE ON CONSOLIDATION. (1) Whenever two or more contiguous or non-contiguous school districts desire to consolidate for the purpose of forming one district, a petition from each such district shall be presented to the district boundary board of the county in which the district having the largest

school census is situated. The petition shall set forth specifically the districts it is proposed to ronsolidate. The petition, if from a district of the first class, must contain the signatures of at least 100 legal school voters, or if from a district of the second class, at least 50 legal school voters, or if from a district of the third class, at le se five legal school voters; or one-third of the legal voters of districts of any class. The petition shall request the district boundary board to submit to the legal voters of the districts, the question of consolidation of such districts.

(2) Within 10 days after receiving such petition, the district boundary board shall notify the district school board of each district designated by the petition, fix the date of and be responsible for supervising the giving of notices as provided in ORS 331.010 for a school meeting in each district to vote upon the question of consolidation of the districts specifically designated in the notice."

* * * * *

Chapter 331, School District Elections and Meetings. Oregon Revised Statutes provides in part:

"ELECTIONS IN DISTRICTS WITH OVER 100,000 POPULATION

* * * * *

331.130 INITIATIVE, REFERENDUM, RECALL AND SUBMISSIONS TO ELECTORATE. The powers of initiative, referendum and recall reserved to the people of such districts by sections 1 and 1a, Article IV of the Oregon Constitution, and section 18, Article II of said Constitution may be exercised at any primary election, any general election or any special election called as provided in ORS 331.140. There may be submitted at any such election to the electorate of such districts the matter of recall of school directors, questions as to the issuance of bonds, the levy of taxes for the support of public schools which may not be levied without the affirmative vote of the people, and any other questions

concerning the public schools which may be submitted to the electorate of such districts under the powers of initiative and referendum. The provisions of ORS 331.110 to 331.180 shall be liberally construed to the end that the power to submit the matters aforesaid to the electors of such districts at elections conducted in compliance with the provisions of ORS 331.110 to 331.180 shall be sustained."

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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 586

H. W. HANSELL, MARK C. DAMRON and GLADYS I. DAMRON, JOHN E. DYBALL, HENRY M. WARREN, JR., and MARION WARREN, and JAMES KEMPTON,
Appellants

and

HARVEY ALUMINUM (INCORPORATED),
Intervenor-Appellant

vs.

G. A. DOUGLASS, ALEX MARSHALL, REX KASEBERG, WILLIAM D. KETCHUM, KENNETH SNODGRASS, KENNETH WEBB, P. EVERETT CURTISS, and T. F. BRUMBAUGH, acting as the District Boundary Board for Wasco County, Oregon; SCHOOL DISTRICT NO. 9, Wasco County, Oregon (Chenowith), and DON CALDER, OLLIE LASH, ROBERT WOOLSEY, NAT JONES and SAM TRAMONTINA, acting as its directors; SCHOOL DISTRICT NO. 52, Wasco County, Oregon (Mosier), and WM. LEININGER, MARVIN HUDSON, JOHN HUSKEY, CLAUDE BERTHOLD and HOWARD ROOT, acting as its directors; SCHOOL DISTRICT NO. 86, Wasco County, Oregon (Rowena), and WM. GARDNER, LEONARD DALBEC, DALE BROTT, MILLIE BRACE and CHAS. BELLERIVE, acting as its directors,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

MOTION TO DISMISS

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DAILY JOURNAL OF COMMERCE

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Rules of The United States Supreme Court
Rule 16 1

Motion to Dismiss

Pursuant to Rule 16 of the Rules of the United States Supreme Court, appellees respectfully request that this Court enter an order dismissing the appeal on the grounds or any one of them it does not comply with 28 U.S.C., Sec. 1257(2), the judgment below rests on an adequate non-federal basis, the question to be reviewed was not timely raised or expressly passed upon and the question raised does not present a substantial federal question.

STATEMENT OF THE CASE

Prior to October 12, 1961 students attending high school grades and resident within School Districts Nos. 9, 52 and 86, Wasco County, Oregon had been attending a high school maintained by School District No. 12. On October 12, 1961, School District No. 12 notified the governing boards of the three districts that no more high school students would be accepted. It was imperative that high school facilities be made available for the high school students of the three districts. A consolidation of the three districts was proposed in order that a high school might be constructed.

Pursuant to a constitutional grant of power (Article VIII, Sec. 3, Oregon Constitution) the legislature of Oregon enacted certain school consolidation election procedure statutes (ORS 330.110 et seq). Under this

constitutional and statutory authority petitions were circulated in the three rural school districts seeking the consolidation of the separate districts into one large district.

A few individuals, appellants herein, and the intervenor, Harvey Aluminum (Incorporated), the largest owner of taxable property in the proposed district, approximately 70% thereof, contested the validity of the consolidation election.

In one district the petition carriers failed to verify the petitions circulated by them. Appellants contend that although the school consolidation statute (ORS 331.110) was silent as to verification, the school districts were governed by a general enactment (ORS Chapter 254) prescribing such a requirement for districts exercising the initiative and referendum powers granted by Article IV, Sec. 1a of the Oregon Constitution.

The Oregon Supreme Court held that Article IV did not apply to school districts and that the legislature, per Article VIII, had prescribed the applicable election procedures for school districts. The unverified petitions contained the signatures of more than 200 legal voters of the district, the statute requiring only 100 such signatures. The trial court found that the appellants had failed to sustain the burden of proving the inadequacy of the petitions.

In each of the three school districts the affirmative vote for consolidation was two votes for each one for the negative. There was no allegation or evidence of fraud in the conduct of the election or tampering with the ballot boxes. No voter had been denied the right to vote and all votes cast were counted. The trial court and the Oregon Supreme Court found that the claim of the appellants that the election procedure was "replete with errors and omissions in flagrant violation of the requirements of the initiative laws of the State of Oregon" was not sustained by the evidence.

The appellants, in their jurisdictional statement of the case, page 4, continue to assert "the notices for election were published by unauthorized agencies * * *" notwithstanding the opinion of the trial court (Memorandum Opinion Juris. St. p 27) that the appellants inadvertently have misread the statutory requirements of ORS 330.110(2).

There was no evidence that any alleged ministerial irregularities would have changed the results of the election. (Memorandum Opinion Juris. St. p. 29 and Oregon Supreme Court Opinion, Juris. St. p 16.)

ARGUMENT

This Appeal Cannot Be Sustained Under 28 U.S.C. Sec. 1257(2)

Appellants rest their appeal on 28 U.S.C. Sec. 1257-

(2). This section requires that a statute repugnant to the Constitution of the United States be drawn into question in a state court and be upheld by the highest court in the state. In the lower court and on appeal appellants relied on Article IV, Sec. 1a of the Oregon Constitution and Chapter 254, Oregon Revised Statutes to support their claim that voters in school districts have the power of initiative and therefore the consolidation election in this case should have been conducted according to laws governing initiative elections. (ORS 254 et seq) (Juris. St p 4)

The Supreme Court held neither the constitutional provision relied upon nor the statutes urged thereunder applied.

Appellees urged that Article VIII Sec. 3 of the Constitution, giving the legislature the responsibility of establishing a common school system and ORS 330.110 et seq setting forth procedures to be followed in a school consolidation election, were controlling.

On appeal, appellants did not challenge the validity of the above constitutional provision and statutes. At page 5 of their reply brief in the Oregon Supreme Court, they state:

> "The initiative statutes, ORS Chapter 254 and Article IV, Sec. 1a, do not conflict with Article VIII, Sec 3, and ORS 330.110."

Neither of these constitutional provisions nor the statutes promulgated thereunder were attacked in the trial or Supreme Courts of Oregon as being repugnant to the Federal Constitution. As a matter of interpretation the Oregon Supreme Court held initiative election procedures (ORS 254 et seq) did not apply—that consolidation election procedures (ORS 330.110 et seq) did.

It is appellees' position such a conclusion does not put the Oregon Supreme Court in the position of upholding a statute which has been challenged as being repugnant to the United States Constitution. Thus it is submitted at the outset, appellants do not have the necessary grounds upon which to base their appeal under 28 U.S.C. Sec. 1257(2). *Slagle v. Ohio*, 366 US 259, 264 (1961); *Raley v. Ohio*, 360 US 423, 434, 435 (1959); *Anonymous v. Baker*, 360 US 287, 290 (1959); *Rohr Aircraft Corp v. County of San Diego*, 362 US 628, 629, 630 (1960).

The Judgment Below Rests On An Adequate Non-Federal Ground

One of the issues before the Supreme Court was whether Article IV, Sec. 1a of the Oregon Constitution granted school districts the initiative power. It is essential to note the Oregon Court has always construed Article XI, Sec. 2, and Article IV, Sec. 1a together. *Rose v. Portland*, 82 Or 541, 548, 162 Pac 498 (1917). These amendments passed in 1906 are commonly re-

ferred to as the "home rule" amendments. Originally it was claimed these amendments gave all municipalities the power to legislate for themselves. *Branch v. Albee*, 71 Or 188, 142 Pac 598 (1914). It was later made clear in *Rose v. Portland*, supra, the initiative power contained in Article IV, Sec. 1a, only applied to cities and towns to the exclusion of all other "municipalities" unless the power was granted by the legislature.

As pointed out in the Oregon Supreme Court's opinion (pp 14 and 15, Juris. St) prior decisions establish that school districts do not come within the constitutional grant of Articles XI, Sec. 2 and IV, Sec. 1a. *School District No. 35 v. Holden*, 78 Or 267, 151 Pac 702 (1915); *School District No. 17 v. Powell*, 203 Or 168, 186, 279 P2d 492 (1955); also see *Carriker v. Lake County*, 89 Or 244, 171 Pac 408 (1918).

Since no federal question was raised or decided by the Oregon Supreme Court, appellees believe the decision below rests squarely on a non-federal basis and as such is not reviewable by this court. *Stembridge v. Georgia*, 343 US 541, 547 (1952); *Ellis v. Dixon*, 349 US 458, 459, 464 (1955); *Williams v. Keyes*, 186 So. 250, 268, 135 Fla 769 (1939). Appellees further contend inasmuch as this case involves interpretation of certain provisions of the Oregon Constitution and the construction of statutes thereunder, questions of local law are

involved, and this Court need not take jurisdiction. *Kiernan v. Portland*, 223 US 151, 163, 164 (1911); *Ohio v. Hildebrant*, 241 US 565, 568 (1915); *Des Moines National Bank v. Fairweather*, 263 US 103, 105 (1923); *Louisville Gas and Electric Co. v. Coleman*, 277 US 32, 36 (1927).

The Federal Question To Be Reviewed Was Not Timely Raised or Passed Upon

Appellants state the federal question sought to be reviewed was first raised in their amended complaint (Juris. St p 5). It is submitted that the phrases "this court should declare the constitutionality of said statutes" and "(2) declaring the validity or invalidity of said school district consolidation proceedings and the constitutionality thereof" appearing in the body and prayer of the amended complaint respectively were insufficient to appraise the court that a violation of Amendment XIV, Sec. 1 of the United States Constitution and Article I, Sec. 20 of the Oregon Constitution was an issue in the case. (Appellants' Ab. of Record and Brief, pp 12, 13).

The transcript of proceedings in the trial court is void of any assertion of a constitutional question. A diligent search of appellants' brief and reply brief in the Oregon Supreme Court fails to disclose any mention of unconstitutionality with respect to the Oregon or United States Constitutions.

A federal question was first presented to the Oregon Supreme Court on May 14, 1963 in appellants' petition for rehearing. The petition was denied May 21, 1963 without opinion.

The decisions of this Court clearly enunciate the policy that the Supreme Court of the United States will not review the judgment of the highest court of a state on a federal question when the question was first raised on petition for rehearing and the petition was denied without opinion. *Hanson v. Denckla*, 357 US 235, 244 (1958); *Wall v. Chesapeake and Ohio Railway Co.*, 256 US 125, 126 (1920); *Citizens National Bank of Cincinnati v. Durr*, 257 US 99 (1921); *Radio Station WOW, Inc. v. Johnson*, 326 US 120, 128 (1945).

This Court further has held that where it is the policy of a state's highest court not to consider a federal question not assigned or relied upon in the briefs or argument of counsel, no basis for review exists. *Hurlburt v. City of Chicago*, 202 US 275, 281 (1905). The Oregon Supreme Court has stated it will not consider an assignment of error involving a constitutional question raised for the first time in the Supreme Court unless the record in the trial court affords some basis for finding that a challenged act invades a constitutional right. *Allen v. City of Portland*, 35 Or 420, 451 (1899); *Highway Commission v. Helliwell*, 225 Or 588, 591, 358 P2d 719 (1961); *Senger v. Vancouver-Portland Bus Co.*,

209 Or 37, 43, 298 P2d 835, 304 P2d 448 (1956). The court has also held a point raised for the first time in a petition for rehearing is not timely. *Rohner v. Neville*, 230 Or 31, 44, 45, 368 P2d 391 (1962).

Appellants' contention that the Federal and Oregon Constitutions were violated was not timely raised or passed upon and decisions of this Court and the Oregon Supreme Court warrant dismissal of the appeal on this ground.

This Appeal Does Not Present A Substantial Federal Question

In their petition for a rehearing appellants for the first time argued that ORS 331.130 granted to school districts of 100,000 or more population the initiative power, and that this grant constituted an irreconcilable conflict with the court's decision that Article IV, Sec. 1a, standing alone, does not give a school district the power to enact its own laws.

Appellees suggest that the decision creates no conflict whatsoever. As pointed out in the opinion:

> "* * * the two amendments (Article IV, Sec. 1a-Article XI, Sec. 2) extended the initiative power only to those municipalities that had the power to legislate; basically cities and towns. * * * 'No other corporate body can, without an enabling act, legislate power unto itself to legislate.' " (Supreme Court Opinion, Juris. St. p 14) (parenthesis added).

The Court further pointed out the two amendments do not prevent the legislature from enacting general legislation governing all municipalities and districts which would include a school district. (Supreme Court Opinion Juris. St. p 15).

Appellees submit school districts of 100,000 or more population have been given the power of initiative, referendum and recall in ORS 331.130 under authority found in Article VIII, Sec. 3, of the Oregon Constitution. The statute (ORS 331.130) makes no reference to Chapter 254 ORS, or procedures outlined therein to conduct an initiative election, but specifically states elections will be conducted in compliance with ORS 331.010 to ORS 331.180. In other words the application of these powers has been limited by the legislature. It is evident from the foregoing a school district having a population of 100,000 or more is not governed by the initiative statutes of the State of Oregon but is governed by election procedures similar to those employed in all school elections.

Even if it were construed ORS 331.130 requires school districts of 100,000 or more population holding an initiative election to conduct same in accordance with Chapter ORS 254 et seq rather than ORS 331.010-331.180, there is no automatic denial of due process or equal protection to voters in smaller districts since the legislature may make reasonable classifications. *Mc-*

Gowan v. Maryland, 366 US 420, 425, 426 (1961); *Mason v. Missouri ex rel McCaffery*, 179 US 328, 335 (1900); *Schmidt v. City of Cornelius*, 211 Or 505, 512, 316 P2d 511 (1957).

Neither *Gomillion v. Lightfoot*, 364 US 342 (1960) nor *Baker v. Carr*, 369 US 186 (1962) cited by appellants are relevant to the facts in this case. (Juris. St. pp 2, 8)

In *Gomillion*, supra, the court was concerned with redistricting which resulted in the loss by negro voters of their right to vote. *Baker*, supra, dealt with unequal apportionment resulting in a dilution of voting power.

In the instant case there is no deprivation of voting rights. We are concerned only with election procedures. A cursory examination of Oregon's school election laws (ORS 330 et seq-ORS 331 et seq) will show adequate control and regulation of elections, contrary to appellants' statement:

> "* * * all other school district elections in the State of Oregon will be subject to a complete lack of control and regulation." (Juris. St. p 9).

CONCLUSION

The Oregon Supreme Court determined that the constitutional home rule amendments do not apply to

school districts in that these districts lack the power to legislate, except as the legislature, pursuant to Article VIII, Sec. 3 of the Oregon Constitution, may enact enabling legislation granting this power.

The Oregon legislature under the constitutional authority of Article VIII, Sec. 3 has established a common school system in this state. It has enacted legislation establishing consolidation election procedures. It has not required such procedures to conform to election procedures established for political subdivisions having initiative and referendum (i.e. legislative) powers.

This appeal involves the interpretation of two provisions of the Oregon Constitution. The Supreme Court of Oregon has applied these provisions to school district consolidation elections by declaring that Article IV, Sec. 1a does not apply and the legislature, pursuant to Article VIII, Sec. 3, may prescribe consolidation election procedures. This matter is wholly local unto the State of Oregon and its constitution and statutes.

It is submitted the lower court's decision is based upon an adequate non-federal basis, that the federal question now before this court was not timely presented to or passed upon by the Oregon Supreme Court, and is not substantial as to merit this court's attention.

For the foregoing reasons this appeal should be dismissed.

Respectfully submitted,

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APPENDIX A

STATE STATUTES AND CONSTITUTION

Oregon Revised Statutes

ORS 254.040 (Juris. St. pp 32, 33)

ORS 254.340

"(1) Any municipality or district in exercising the powers of the initiative and referendum granted by sections 1 and 1a, Article IV, Oregon Constitution, shall follow the procedure in ORS 221.210, 221.310, 250.230, 254.030 to 254.100, 254.110 to 254.170, 254.320, 254.330, and 255.410 to 255.450 * * *"

ORS 330.110 (Juris. St. pp 33, 34)

ORS 331.130 (Juris. St. pp 34, 35)

Oregon Constitution

Article I, Sec. 20 (Juris. St. p 31)

Article IV, Sec. 1a (Juris. St. pp 31, 32)

Article VIII, Sec. 3

"The Legislative Assembly shall provide by law for the establishment of a uniform and general system of common schools."

Article XI, Sec. 2

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, * * *"